

1 THE HONORABLE JOHN C. COUGHENOUR  
2  
3  
4  
5  
6

7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
9 AT SEATTLE

10 MARVIN DYKES and MARK HARRIS,

11 Plaintiffs,

v.

12 BNSF RAILWAY COMPANY,

13 Defendant.

CASE NO. C17-1549-JCC

ORDER

15 This matter comes before the Court on Plaintiffs'<sup>1</sup> motion for partial summary judgment  
16 (Dkt. No. 80) and motion for sanctions for spoliation of evidence (Dkt. No. 82). Having  
17 thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument  
18 unnecessary and hereby DENIES the motion for partial summary judgment and GRANTS in part  
19 and DENIES in part the motion for sanctions for spoliation of evidence for the reasons explained  
20 herein.

21 **I. BACKGROUND**

22 The Court has detailed the facts of this case in a prior order, which it will cite to as  
23 relevant to the present motions. (*See* Dkt. No. 77.) On May 14, 2017, Plaintiffs were working as

25 <sup>1</sup> On March 7, 2019, the Court received telephonic notice that Plaintiff Mark Harris had  
26 settled his claims against Defendant. As Plaintiffs have not filed a notice of settlement regarding  
the disposition of Mr. Harris' claim, the Court writes this order as if he is still part of the lawsuit.

1 the conductor and locomotive engineer aboard a train owned by Defendant BNSF Railways  
2 (“BNSF”) that derailed near Surrey, British Columbia. (*Id.* at 1–2.) The train derailed on a  
3 section of railway known as the “Brownsville Lead” that is owned by Canadian National  
4 Railway Company (“CNR”).<sup>2</sup> (*Id.* at 2.) BNSF operated its trains on the Brownsville Lead  
5 pursuant to an Interchange Agreement with Running Rights (the “Interchange Agreement”) with  
6 CNR. (*Id.*) The Interchange Agreement allowed BNSF to use the Brownsville Lead to conduct  
7 interchange operations at CNR’s Thornton Yard. (*Id.*) The Interchange Agreement makes CNR  
8 exclusively responsible for managing, maintaining, and repairing the Brownsville Lead. (*Id.*)

The parties do not dispute that the train derailed because of a broken rail on the Brownsville Lead. (*Id.*) Days after the derailment, BNSF sent CNR an email asking it to “capture, retain and provide (if requested) the evidence secured during the course of [CNR’s] investigation . . . .” (Dkt. No. 88-1 at 2.) Despite this request, CNR did not preserve the broken rail and does not know where it is. (Dkt. No. 83-1 at 10, 83-3 at 19.) As a result, the broken rail did not undergo testing to determine the cause of the break. (Dkt. Nos. 52-4 at 16, 83-3 at 18.)

15 Plaintiffs filed this lawsuit against BNSF for negligence under the Federal Employer's  
16 Liability Act ("FELA"), 45 U.S.C. § 51.<sup>3</sup> (Dkt. No. 1-2.) Plaintiffs allege that BNSF breached its  
17 duty to provide them with a reasonably safe workplace by failing to inspect and repair the broken  
18 rail that caused the derailment. (*Id.* at 3; Dkt. No. 78 at 3.) BNSF moved for summary judgment  
19 on Plaintiffs' claims, arguing that there was no evidence that it was directly negligent in failing  
20 to discover the broken rail, and that it could not be held liable for CNR's negligence, if any,  
21 because CNR was not its agent. (Dkt. No. 46.)

<sup>22</sup> The Court denied BNSF's motion for summary judgment on both grounds. (Dkt. No. 77.)

<sup>2</sup> BNSF filed a third-party claim against CNR for indemnification pursuant to the parties' Interchange Agreement; however, the Court dismissed CNR for lack of personal jurisdiction. (See Dkt. No. 76.)

<sup>3</sup> Because this incident occurred in Canada, FELA's provisions apply through Washington law. See Wash. Rev. Code 51.12.080.

1 First, the Court ruled that Plaintiffs had produced sufficient evidence for a jury to determine that  
2 BNSF had breached its nondelegable duty to provide them with a safe workplace. (*Id.* at 8.)  
3 Second, the Court held that CNR was acting as BNSF's agent for the purposes of FELA liability.  
4 (*Id.* at 10.) The Court reasoned that CNR was performing several "operational tasks" for BNSF  
5 pursuant to the Interchange Agreement, such as the provision, inspection, and repair of the  
6 railways BNSF used to conduct business in British Columbia. (*Id.*) Therefore, CNR's  
7 negligence, if any, in failing to inspect, maintain, and repair the broken rail can be imputed to  
8 BNSF under FELA. (*Id.*)

9 Plaintiffs now move for partial summary judgment asking the Court to find that BNSF  
10 was negligent as a matter of law, while reserving the issues of causation and damages for trial.  
11 (Dkt. Nos. 80 at 1, 92 at 1.) Plaintiffs also move the Court to sanction BNSF for CNR's failure to  
12 preserve the broken rail. (Dkt. No. 82 at 2.) Plaintiffs argue that the Court should either enter  
13 partial summary judgment against BNSF or provide the jury with an adverse inference  
14 instruction regarding CNR's failure to preserve the rail. (*Id.* at 10–11.) BNSF objects to both  
15 motions. (Dkt. Nos. 85, 87.)

## 16 **II. DISCUSSION**

### 17 **A. Summary Judgment Standard**

18 "The court shall grant summary judgment if the movant shows that there is no genuine  
19 dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R.  
20 Civ. P. 56(a). In making such a determination, the Court must view the facts and justifiable  
21 inferences to be drawn therefrom in the light most favorable to the nonmoving party. *Anderson v.*  
22 *Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Once a motion for summary judgment is properly  
23 made and supported, the opposing party "must come forward with 'specific facts showing that  
24 there is a *genuine issue for trial.*'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S.  
25 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)). Material facts are those that may affect the  
26 outcome of the case, and a dispute about a material fact is genuine if there is sufficient evidence

1 for a reasonable jury to return a verdict for the non-moving party. *Anderson*, 477 U.S. at 248–  
2 49.)

3           **B. Plaintiffs' Motion for Partial Summary Judgment**

4            1. FELA Legal Standard

5           Under FELA, “[e]very common carrier by railroad . . . shall be liable in damages to any  
6 person suffering injury while he is employed by such carrier . . . for such injury or death  
7 resulting in whole or in part from the negligence of any of the officers, agents, or employees of  
8 such carrier.” 45 U.S.C. § 51. A FELA plaintiff bears the burden of proving the existence of a  
9 duty owed by the defendant, a breach of that duty, causation, and damages. *See Consol. Rail*  
10 *Corp. v. Gottshall*, 512 U.S. 532, 538 (1994).

11           Under FELA, railroads owe their employees a nondelegable duty to use reasonable care  
12 in furnishing them with a safe place to work. *Shenker v. Baltimore & O. R. Co.*, 374 U.S. 1, 7  
13 (1963). “[The] continuous duty to provide a safe place to work is broader than the general duty to  
14 use reasonable care.” *Ragsdell v. S. Pac. Transp. Co.*, 688 F.2d 1281, 1283 (9th Cir. 1982). The  
15 duty applies even when a railroad’s employees are working on a third party’s property over  
16 which the railroad has no control. *Bodey v. Burlington N. R. Co.*, 62 F.3d 1423 (9th Cir. 1995)  
17 (citing *Shenker*, 374 U.S. at 8).

18           “An employer breaches its duty to provide a safe workplace when it knows or should  
19 know of a potential hazard in the workplace, yet fails to exercise reasonable care to inform and  
20 protect its employees.” *Galloose v. Long Island R. Co.*, 878 F.2d 80, 84–85 (2d Cir. 1989).  
21 Federal courts have held that the duty requires railroads to “inspect the third party’s property for  
22 hazards and to take precautions to protect [their] employee[s] from possible defects.” *Carter v.*  
23 *Union R. Co.*, 438 F.2d 208, 211 (3d Cir. 1971) (collecting cases); *see also Tappero v. S. Pac.*  
24 *Transp. Co.*, 859 F.2d 154 (9th Cir. 1988) (finding that defendant railroad negligently failed to  
25 furnish its employees a reasonably safe place to work by failing to exercise due care in its  
26 inspection of the rail.).

1                   2.     CNR's Negligence

2       Plaintiffs' primary argument on summary judgment is that CNR's negligence in  
3 inspecting, maintaining, and repairing the Brownsville Lead's rails should be imputed to BNSF  
4 through the Court's prior agency ruling. (See Dkt. No. 92 at 2.) As BNSF's agent under FELA,  
5 CNR had a duty to exercise reasonable care to inspect and repair hazardous conditions on its  
6 railways. *See* 45 U.S.C. § 51; *Ragsdell*, 688 F.2d at 1283.

7       Plaintiffs offer significant evidence that CNR failed to exercise reasonable care in  
8 inspecting and repairing the section of rail on the Brownsville Lead where the train derailed.  
9 Pictures from the derailment site show visible surface defects on the rails, including shelling and  
10 discoloration. (Dkt. No. 81-4 at 8.) In February 2017, CNR conducted a heavy geometry car  
11 inspection of the Brownsville Lead and found various defects in the track where the derailment  
12 occurred. (Dkt. No. 81-3 at 15.) That section of track displayed both cross level and wide gauge  
13 defects, which CNR characterized as "near urgent" and "scheduled for repair" in its inspection  
14 report.<sup>4</sup> (*Id.* at 16–17, 42.) Neither CNR nor BNSF have provided records showing that repairs  
15 were made to the subject rail prior to the derailment. (*Id.* at 17.)

16      On April 21, 2017, CNR conducted ultrasonic testing on the Brownsville Lead and  
17 discovered defects in the area of the derailment. (Dkt. No. 86-1 at 4.) However, Plaintiffs' expert  
18 witness was not able to say whether those defects caused the broken rail or played a role in the  
19 derailment. (Dkt. No. 81-5 at 13.) Both Plaintiffs' and BNSF's expert witnesses noted that the  
20 broken rail had a "detail fracture" that originated at or near the surface of the rail head, had  
21 progressed through "approximately 70% of the head width," and was visible in pictures taken  
22 after the derailment. (Dkt. No. 81-6 at 16.)

23      The crosstie closest to the broken rail had missing and loose fasteners—a condition

---

24                  25      <sup>4</sup> A cross level defect describes a situation in which the difference in elevation between  
26      the two rails at a given point is outside of an accepted tolerance level. (Dkt. No. 83-1 at 15–16.)  
A wide gauge defect describes a situation in which the width between the two rails at a given  
point is outside of an accepted tolerance level. (*Id.*)

1 which BNSF's expert concluded allowed "the rail to flex excessively, leading to the final rail  
2 failure." (*Id.* at 17.) One of BNSF's corporate agents stated in his deposition that he would  
3 consider the crosstie defective based on BNSF's standards, but that he did not think it would  
4 "limit the operating speed or operation over that particular piece of track." (Dkt. No. 81-2 at 10.)  
5 The broken crosstie had a red-paint marking on it, which CNR's Senior Manager of Engineering  
6 stated is sometimes used during inspections to signal a defective condition that is scheduled for  
7 repair. (Dkt. No. 81-3 at 10–11, 40.)

8       Based on the above facts, Plaintiffs' expert opined that CNR failed to "use reasonable  
9 and customary care, skill and diligence in the construction, operation, maintenance, repair and  
10 renewal" of the tracks where the derailment occurred. (*Id.* at 22.) BNSF's expert did not provide  
11 an opinion regarding whether CNR acted with reasonable care in inspecting, maintaining, or  
12 repairing the broken rail. (Dkt. No. 81-6 at 17–18.) Plaintiffs further argue that they were unable  
13 to determine the true cause of the broken rail because BNSF and CNR failed to preserve the rail  
14 for testing. (Dkt. No. 80 at 14.) Plaintiffs asserts that this weighs in favor of finding that CNR  
15 was negligent as a matter of law.<sup>5</sup> (*Id.*)

16       BNSF points to the following evidence that suggests that CNR was not negligent in  
17 failing to inspect or repair the broken rail, or that there are at least disputed issues of material fact  
18 that must be decided at trial. CNR's corporate representative stated in his deposition that CNR's  
19 inspections of the Brownsville Lead prior to the derailment did not reveal defects that made the  
20 tracks noncompliant with safety standards or unusable. (Dkt. No. 86-1 at 3) ("as per the  
21 inspection, the track was safe and compliant for safe operation of trains."). CNR conducted  
22 weekly inspections of the Brownsville Lead, and an inspection was conducted five days before  
23 the derailment. (*Id.* at 13; Dkt. No. 47-2 at 39.) While CNR could not state when the subject rail  
24 broke, it stated that "we know it was on or about [the] time" of the derailment. (Dkt. No. 81-3 at  
25

---

26               <sup>5</sup> The Court addresses the spoliation issue more fully when discussing Plaintiffs' motion  
for sanctions. *See Part II.C.*

1 21.) Although CNR could not produce repair records for the cross level and wide gauge defects  
2 identified by the February 2017 heavy car geometry test, it maintained that the most recent  
3 inspection of the Brownsville Lead showed that the rails were safe for travel.<sup>6</sup> (Dkt. No. 86-1 at  
4 13.) CNR's corporate representative testified that while these defects were identified as "near  
5 urgent," scheduled repairs could take place anywhere from 10 to 100 days after the inspection.  
6 (*Id.* at 12.)

7       CNR hired a third party to review the last ultrasonic test that was conducted on the  
8 Brownsville Lead prior to the derailment to determine if there were flaws present at the site of  
9 the broken rail. (*Id.* at 4.) The reviewer concluded that there were "no indications" of a defect on  
10 the broken rail. (*Id.* at 5.) While there was a marked defect "a few feet away," it was located on  
11 the rail opposite the broken rail. (*Id.*)

12       CNR disputes that the crosstie adjoining the broken rail was sufficiently defective such  
13 that it rendered the rail unsafe for travel. (*Id.* at 7–8.) CNR's Senior Manager of Engineering  
14 stated that loose bolts on the tie plate next to the broken rail did not represent a defect. (*Id.* at 7)  
15 ("That's not a defect, not specifically with the raised bolts. If the track can maintain gauge in the  
16 surface in the surface it's still okay."). He also stated that one broken tie plate is not a defect that  
17 would need to be repaired, and that several consecutive tie plates would need to be broken in  
18 order for CNR to conduct an immediate repair. (*Id.* at 8) ("As per standards one is not a defect so  
19 it's not an urgent priority fix."). He further stated that one degraded crosstie would not represent  
20 a defective condition that required immediate repair. (*Id.*) ("One single tie is not a defective  
21 condition. If there's multiple in an area, then yes.").  
22

22       Viewing the above evidence in the light most favorable to BNSF, the Court concludes  
23 that there are genuine disputes of material fact regarding whether CNR exercised reasonable care  
24 in inspecting and repairing the section of the Brownsville Lead where the derailment occurred.  
25

---

26       <sup>6</sup> CNR implied in its deposition that the repairs were made. (See Dkt. No. 86-1 at 12)  
("By looking at this I can't confirm exactly the date it was repaired on.").

1 There is a genuine dispute about whether CNR adequately inspected the subject rail prior to the  
2 derailment—specifically whether CNR’s inspections failed to uncover the defects that could  
3 have contributed to the broken rail. There is also a genuine dispute regarding whether CNR  
4 should have repaired the defective conditions it discovered prior to the derailment. Drawing all  
5 inferences in BNSF’s favor, a reasonable juror could conclude that CNR’s failure to repair  
6 defects identified in its prior inspections was not a breach of its duty to exercise reasonable care  
7 to ensure the Brownsville Lead was safe for trains to operate.

8       The Court reiterates that in the FELA context, it is especially important for a jury to  
9 decide the question of negligence. *See Pierce v. S. Pac. Transp. Co.*, 823 F.2d 1366, 1370 (9th  
10 Cir. 1987) (“A jury’s right to pass upon the questions of fault and causation in FELA actions  
11 must be viewed liberally; the jury’s power to engage in inferences is significantly broader than in  
12 common law negligence actions.”). Therefore, Plaintiffs’ motion for partial summary judgment  
13 as to BNSF’s negligence based on the conduct of CNR (Dkt. No. 80) is DENIED.<sup>7</sup>

14       **C. Plaintiffs’ Motion for Sanctions**

15       Plaintiffs assert that both BNSF and CNR spoliated evidence by failing to preserve the  
16 broken rail in anticipation of this lawsuit. (Dkt. No. 82 at 2.) As a result, Plaintiffs argue that  
17 they were unable to determine how the rail broke, and are hamstrung in proving that BNSF and  
18 CNR were negligent in failing to detect or prevent the break. (*Id.*) Plaintiffs ask the Court to  
19 sanction BNSF and CNR by ruling that they were negligent as a matter of law. (*Id.* at 10.)

20       District courts possess inherent authority to impose sanctions against a party that  
21 prejudices its opponent through the destruction or spoliation of relevant evidence. *See Glover v.*  
22 *BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993). Spoliation is the “destruction or significant  
23 alteration of evidence, or the failure to preserve property for another’s use as evidence, in

24

---

25       <sup>7</sup> The Court reserves for trial the issue of BNSF’s direct negligence because that issue  
26 will similarly turn on factual issues regarding whether CNR acted negligently in failing to  
inspect and repair the Brownsville Lead.

1 pending or future litigation.” *Kearney v. Foley & Lardner, LLP*, 590 F.3d 638, 649 (9th Cir.  
2 2009). A party seeking sanctions for spoliation first bears the burden of establishing that the  
3 opposing party destroyed relevant evidence. *Ryan v. Editions Ltd. W., Inc.*, 786 F.3d 754, 766  
4 (9th Cir. 2015). The party alleging spoliation must prove:

5 (1) that the party having control over the evidence had an obligation to preserve it  
6 at the time it was destroyed; (2) that the records were destroyed with a ‘culpable  
7 state of mind;’ and (3) that the evidence was ‘relevant’ to the party’s claim or  
defense such that a reasonable trier of fact could find that it would support that  
claim or defense.

8 *Apple Inc. v. Samsung Elecs. Co.*, 888 F. Supp. 2d 976, 989 (N.D. Cal. 2012) (citing cases).

9 When spoliation has occurred, district courts may impose a variety of sanctions, including:

10 (1) exclusion of evidence, (2) admitting evidence of the circumstances of the  
11 destruction or spoliation, instructing the jury that it may infer that the lost evidence  
12 would have been unfavorable to the party accused of destroying it, or (4) entering  
13 judgment against the responsible party, either in the form of dismissal or default  
judgment.

14 *Pettit v. Smith*, 45 F. Supp. 3d 1099, 1105 (D. Ariz. 2014).

15 As an initial matter, it is undisputed that CNR failed to preserve the broken rail at issue in  
16 this case. CNR’s internal records show that it intended to send the broken rail to a lab “for  
17 further analysis,” but never did so. (Dkt. No. 83-3 at 8.) CNR’s corporate representative testified  
18 that he did not know why the rail was not sent to the lab and did not know where the rail was.  
19 (*Id.* at 8–9, 13.) CNR has not provided any explanation for why the rail was not preserved or  
20 what became of it. (*See id.*)

21 Not only did CNR fail to preserve the broken rail as evidence, it was undoubtedly on  
22 notice that future litigation could arise from the derailment. Two days after the derailment, BNSF  
23 wrote an email to CNR to inform it that BNSF was “preserving potentially relevant evidence  
24 relating to this incident.” (Dkt. No. 88-1 at 2.) BNSF asked CNR to “capture, retain and provide  
25 (if requested) the evidence secured during the course of [CNR’s] investigation . . .” (*Id.*)  
26 Notwithstanding BNSF’s request, CNR would have also been on notice of its obligation to

1 preserve the broken rail because, under the Interchange Agreement, it could potentially be liable  
2 for the property damage and personal injuries that resulted from the derailment. (*See* Dkt. No.  
3 88-2 at 8.) There is also no question that the broken rail would be highly relevant evidence in any  
4 future litigation arising from the derailment. *See supra* Part II.B.

5 Having determined that spoliation occurred, the Court must determine which party should  
6 be sanctioned and the appropriate sanction. The undisputed evidence demonstrates that BNSF  
7 neither possessed nor exercised control over the broken rail. CNR owns the Brownsville Lead,  
8 and pursuant to the Interchange Agreement had exclusive control over the maintenance and  
9 repair of the broken rail. (Dkt. Nos. 47-2 at 4, 88-2 at 4.) Representatives of both BNSF and  
10 CNR have testified that BNSF personnel did not have access to or control over the rails at the  
11 Brownsville Lead, and were limited in the investigation they could conduct into the causes of the  
12 broken rail. (Dkt. No. 83-2 at 6–7, 88-5 at 3–4) (“Our inspectors are not typically allowed to  
13 measure track on other railways. It’s like going into someone’s house and digging through the  
14 cupboards.”). There is no evidence in the record suggesting BNSF had access to the broken rail,  
15 aside from when its trainmaster was at the derailment site for a few hours after the accident. (*See*  
16 Dkt. No. 83-1 at 7–10.) As the Court previously noted, BNSF requested that CNR preserve all  
17 evidence related to the derailment, but CNR simply ignored that request with regard to the  
18 broken rail. Therefore, BNSF is not directly responsible for spoliation of the broken rail.

19 Plaintiffs suggest that BNSF can still be held liable for CNR’s spoliation because the  
20 latter was acting as the former’s agent. (Dkt. No. 82 at 2.) Plaintiffs argue that because of the  
21 agency relationship “the failures of CNR to act to preserve the evidence is imputed to BNSF.”  
22 (*Id.* at 9.) It is not uncommon for courts to hold principals liable for spoliation committed by  
23 their agents. *See, e.g., Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 515 n.23 (D.  
24 Md. 2010) (holding defendant liable for spoliation committed by its attorneys). However, such  
25 imputation of liability is based on traditional notions of agency law, in which a defendant  
26 principal exercises control and authority over its third-party agent who possesses the spoliated

1 evidence. *See, e.g., Goodman v. Praxair Servs., Inc.*, 632 F. Supp. 2d 494, 523 n.16 (D. Md.  
2 2009) (defendant employer held liable for employee's spoliation of evidence under agency  
3 theory).

4 In this case, the Court has previously ruled that CNR was acting as BNSF's agent *for*  
5 *purposes of FELA liability.* (*See* Dkt. No. 72 at 8) ("[B]y allowing BNSF to use the Brownsville  
6 Lead pursuant to the Interchange Agreement, CNR was performing operational activities for  
7 BNSF such that it was the railroad's agent under FELA."). The Court's ruling was based on the  
8 "accommodating scope" that Congress intended, and that federal courts have given, to FELA's  
9 concept of agency. (*Id.* at 10) (citing *Sinkler v. Missouri Pac. R. Co.*, 356 U.S. 326, 331 (1958)).  
10 In contrast to Plaintiffs' position, the Court's agency determination was cabined to the issue of  
11 BNSF's FELA liability and does not control BNSF's liability for CNR's spoliation of evidence.

12 Put simply, CNR is not BNSF's agent under traditional standards of agency law. As  
13 relevant to this case, BNSF and CNR's relationship was embodied in the Interchange  
14 Agreement. (*See* Dkt. No. 88-2 at 2–12.) The Interchange Agreement allowed BNSF to use the  
15 Brownsville Lead to conduct its interchange operations, but did not provide BNSF with any  
16 authority or control over how CNR inspected, maintained, or repaired its rails. (*See id.*) The  
17 Interchange Agreement certainly did not authorize BNSF to compel CNR to provide it with the  
18 broken rail in this case, or for BNSF to retrieve any physical evidence from the Brownsville  
19 Lead. (*Id.*) BNSF also correctly points out that it not only lacks authority over CNR, but that the  
20 entities are adverse parties in this litigation. (Dkt. No. 87 at 4.) Pursuant to the Interchange  
21 Agreement's indemnity provisions, CNR will be potentially liable to BNSF for any judgment  
22 that is entered against it in this action. (*See* Dkt. No. 88-2 at 10.) Given their adverse  
23 relationship, the Court cannot conclude that CNR is BNSF's agent for the purpose of imposing  
24 spoliation sanctions.

25 The Court does conclude, however, that CNR can, and should, be sanctioned for its  
26 spoliation of the broken rail. Courts in the Ninth Circuit have held that a non-party can have a

1 duty to preserve evidence, when it is not “merely a disinterested third-party.” *Pettit*, 45 F. Supp.  
2 at 1106 (sanctioning non-party state agency for its spoliation because it controlled the relevant  
3 evidence and would potentially be liable for paying a judgment in the case). CNR is not a  
4 disinterested third-party in this case—it possessed and controlled a key piece of evidence; was on  
5 notice that litigation involving that evidence would likely ensue; and could potentially be liable  
6 for indemnifying BNSF. *See supra*. As the Court has explained above, all of the spoliation  
7 factors are met regarding CNR’s failure to preserve the broken rail. *See Apple*, 888 F. Supp. 2d at  
8 989.

9 Plaintiffs argue that the appropriate sanction is for the Court to enter judgment against  
10 BNSF on the issue of negligence. (Dkt. No. 82 at 10.) The Court finds that this would be an  
11 overly harsh sanction, given that BNSF did not have control over the broken rail and attempted  
12 to have it preserved. Indeed, the Court’s spoliation sanction should be targeted at the responsible  
13 party. *See Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001) (holding that courts  
14 must find some degree of fault in imposing sanctions and that “the applicable sanction should be  
15 molded to serve the prophylactic, punitive, and remedial rationales underlying the spoliation  
16 doctrine.”).

17 The Court finds that an adverse jury instruction regarding CNR’s spoliation is an  
18 appropriately tailored sanction under the circumstances. District courts possess “broad  
19 discretionary power to permit a jury to draw an adverse inference from the destruction or  
20 spoliation against the party or witness responsible for that behavior.” *Glover*, 6 F.3d at 1329  
21 (citing *Akiona v. United States*, 938 F.2d 158 (9th Cir. 1991)). An adverse inference instruction  
22 regarding CNR’s conduct will adequately balance the prejudice Plaintiffs have experienced with  
23 the fact that BNSF was not responsible for the spoliation. The instruction will allow the jury to  
24 presume that CNR’s failure to preserve the broken rail is indicative of its negligence.<sup>8</sup> Such an  
25 instruction will properly sanction CNR’s conduct, while not indicating to the jury that BNSF was

---

26 <sup>8</sup> The Court will consider proposed adverse inference instructions from both parties.

1 at fault for failing to preserve a key piece of evidence.

2 **III. CONCLUSION**

3 For the foregoing reasons, Plaintiffs' motion for partial summary judgment (Dkt. No. 80)  
4 is DENIED, and motion for spoliation of evidence (Dkt. No. 82) is GRANTED in part and  
5 DENIED in part.

6 DATED this 12th day of March 2019.

7  
8  
9  
10   
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

John C. Coughenour  
UNITED STATES DISTRICT JUDGE